



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Fluid Power International, Inc.

File: B-278479

Date: December 10, 1997

Elizabeth S. Phelps for the protester.

Richard N. Wolf, Esq., and Shawn T. Gallagher, Esq., National Aeronautics & Space Administration, for the agency.

Adam Vodraska, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protester's quote under a small business-small purchase set-aside was properly rejected where it did not offer the product of a small business as required by the nonmanufacturer rule applicable to this solicitation.

DECISION

Fluid Power International, Inc., (FPI) protests the actions of the National Aeronautics and Space Administration (NASA) with regard to request for quotations (RFQ) No. 1-067-GGI.2049 for an in-line filter assembly to be installed in a wind tunnel at NASA's Langley Research Center.

We dismiss the protest.

Under the simplified acquisition procedures being used here, an acquisition of supplies that has an anticipated dollar value exceeding \$2,500 and not exceeding \$100,000, as anticipated here, is reserved exclusively for small business concerns in accordance with the set-aside procedures of Federal Acquisition Regulation (FAR) subpart 19.5. FAR § 13.105(a). The RFQ, pursuant to FAR § 19.508(c), incorporated the required Notice of Total Small Business Set-Aside, FAR § 52.219-6, which provides that, for a small business set-aside, a small business concern submitting an offer in its own name agrees to furnish, in performing the contract, only end items manufactured or produced by itself or other domestic small business concerns; this requirement is known as the "nonmanufacturer rule." FAR §§ 19.001, 19.102(f)(1).

The nonmanufacturer rule may be waived where the acquisition is for a product in a class for which the Small Business Administration (SBA) has determined that there are no small business manufacturers in the Federal market, FAR § 19.102(f)(4), or where, for a specific acquisition, the contracting officer determines that there are no known domestic small business manufacturers that

can reasonably be expected to offer a product meeting the requirements of the solicitation, FAR § 19.102(f)(5), and the SBA, in response to the contracting officer's request, waives the requirement with respect to that solicitation, FAR § 19.502-2(c). An SBA waiver implemented in the solicitation permits a small business to provide any firm's product in response to the solicitation. Id.; see Adrian Supply Co., B-257261, Sept. 15, 1994, 95-1 CPD ¶ 21 at 3. The solicitation at issue here is not for a product in a class for which the SBA has waived the nonmanufacturer rule. The contracting officer reports that she did not seek a waiver of the nonmanufacturer rule from SBA for this RFQ because she could not determine that there were no small business manufacturers of the solicited item.

NASA received three quotes in response to this RFQ. Pall Advance Separations Systems, a large business, submitted the low quote and FPI the second lowest quote. FPI's quote offered Pall's product.

NASA issued the purchase order to Pall. When FPI brought Pall's large business status to the attention of NASA, the order was cancelled. NASA determined that FPI's quote was unacceptable and FPI was ineligible for award because FPI was a small business nonmanufacturer, but it offered an end item manufactured by a large business, which was prohibited by the RFQ. Since the third offeror, a small business concern, also proposed the product of a large business, the contracting officer concluded that NASA had received no acceptable offers from responsible small business concerns. Thus, the contracting officer decided to withdraw the small business set-aside, cancel the RFQ, and resolicit on an unrestricted basis. FPI was so informed and protested to our Office.

Notwithstanding that FPI certified in its quote that it is a small business concern, its quote was predicated on furnishing a product manufactured by Pall, a large business. Thus, NASA properly considered FPI's quote unacceptable because it was not offering to comply with the nonmanufacturer rule under this total small business set-aside, which, unless waived, requires that the product of a small business be offered. See Innovative Refrigeration Concepts, B-258655, Feb. 10, 1995, 95-1 CPD ¶ 61 at 4-5; Food Tech Indus. Co., Inc., B-232791, Oct. 25, 1988, 88-2 CPD ¶ 392 at 1-2. Moreover, it would have been improper for NASA to seek a waiver from the SBA of the nonmanufacturer rule after quotes were received in order to make award to FPI under the RFQ because, even if granted, this would allow for award to be made on a materially different basis from that on which quotes were solicited and would be prejudicial to other vendors or potential vendors. See Adrian Supply Co., *supra* at 7; General Metals, Inc., B-247560, May 29, 1992, 92-1 CPD ¶ 486 at 2; Data Equip., Inc., GSBCA No. 12506-P, Sept. 28, 1993, 94-1 BCA ¶ 26446, 1993 BPD ¶ 268. Accordingly, we think FPI has no valid legal basis upon which to object to the contracting officer's decision not to issue the purchase

order to FPI under this small business-small purchase set-aside.¹ Since the contracting officer received no acceptable offers from responsible small business concerns, she acted reasonably in withdrawing the set-aside and in deciding to resolicit for the item on an unrestricted basis. FAR § 19.502-2(a).

Because FPI's quote is ineligible for award, we also see no useful purpose in addressing the improprieties alleged by FPI in NASA's placement of the order directly with FPI's large business supplier since NASA promptly corrected this mistake. FPI's claim for bid preparation and protest costs is denied since we are dismissing the protest. East West Research, Inc., B-243224, Mar. 19, 1991, 91-1 CPD ¶ 303 at 3.

The protest is dismissed.

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¹FPI contends that in offering to supply the product of a large business it relied upon the oral advice of a contracting official that the product of any manufacturer could be offered. However, any such direction from that contracting official would represent a material change to the terms of the RFQ, which clearly stated that the acquisition was a total small business set-aside and did not allow for the products of large businesses. Where, as here, an alleged oral modification to the solicitation is inconsistent with the written solicitation, absent a written amendment or confirmation of the oral advice, we will find unreasonable a protester's reliance on the alleged oral representation. See Rick Manning, B-257095, July 28, 1994, 94-2 CPD ¶ 50 at 3.